

JUDICIAL ELECTIONS; LET'S BE HONEST!

*Justice Kenny Griffis**

In the 1830s, Mississippi judicial selection pitted the “whole-hogs” versus the “half-hogs.”¹ Eventually, the “whole hogs” won. From 1916 until 1994, Mississippi elected all judges by partisan elections.

Until 1994, Mississippi judicial elections were partisan, extremely partisan. In fact, Mississippi was overwhelmingly a Democrat state. Judicial elections were decided in the Democrat primary. Rarely ever did Mississippi have a contested general election for a judicial seat.

The winds of change set in. In 1991, Mississippi elected Kirk Fordice, the first Republican Governor since Reconstruction. Several powerful legislative Democrat leaders saw what was coming,² and they wanted to preserve control.

The legislative response was a noble one. The legislature created the Court of Appeals, redistricted trial courts, and decided our century old partisan-elected judiciary needed to move to “nonpartisan” elections. The Republicans, including Governor Fordice, bought in to this change as “good government.”

University of Mississippi School of Law Professor David W. Case warned the legislature about non-partisan elections:

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¹ David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. COLL. L. REV. 1, 5 (1993).

² Since 1991, Mississippi has had one Democrat Governor (Ronnie Musgrove) who served one term, and four Republican Governors (Fordice, Haley Barbour, Phil Bryant, and Tate Reeves) who served a combined eight terms in office.

Progressive reformers hoped that non-partisan elections would allow voters to focus on candidates' individual traits without regard to political considerations. The goal of non-partisan elections is to remove judicial elections from party politics, freeing candidates from partisan obligations and allowing voters to decide on the basis of merit, rather than party affiliation. Non-partisan ballots are intended to avoid straight party voting, thus preventing judicial candidates from becoming enmeshed in the "sweep factor", where, because of volatile political events, legislative and executive officials of one party are swept out of office in favor of candidates from the other. In a further effort to limit the influence of party politics, some states schedule judicial elections in off-years.

Despite the laudable objective of removing judges from party politics, critics argue that non-partisan elections "are in many respects worse than partisan judicial elections." Foremost among the criticisms is that non-partisan elections have even lower visibility and voter participation than do partisan elections. In fact, studies have shown that voter participation decreases in proportion to increases in effort to remove judicial elections from partisan politics. Because of the paucity of information typically available in judicial elections, voters tend to rely heavily on party cues as a determining factor. Without the party label, confusion tends to discourage voters from even casting ballots in non-partisan elections. To the extent that accountability can be measured in terms of voter participation, therefore, non-partisan elections have even less to offer in that regard than do partisan elections. Nor are concerns for judicial independence satisfied, as non-partisan elections do little to shield judges from the transitory whims of majoritarian electoral politics. Moreover, all of the more tangible disadvantages to electing judges, such as fundraising, high cost, and time spent away from judicial duties because of campaigning, remain intact.³

Later, former Court of Appeals Judge and now Fifth Circuit Judge Leslie Southwick noted:

³ *Id.* at 21.

Of the election procedures, the worst is nonpartisan election. It is a system built on denying voters what they really want to know about judicial candidates. If there are to be elections, then partisan elections are preferable. They should be free of unconstitutional restrictions on political speech. The winner quite possibly will be determined more by party label than any other consideration, but at least that is a reasonable if imperfect gauge of significant ideological differences between the candidates. Other differences are unlikely to be perceived. Campaigns now surely must be mush for voters even when served up at an extremely high temperature.⁴

In 1994, Mississippi adopted the Nonpartisan Judicial Election Act.⁵ Mississippi made it illegal for judicial candidates to campaign or qualify “based on party affiliation,” and if a candidate indicated their partisan ties, she would “forfeit the election” and the election would be “void.” No other election law “voids” an election if the candidate exercises their right to freedom of speech protected in the First Amendment of the United States Constitution.

What is lost on nonpartisan judicial election is that voters want to know who the candidate is, what the candidate believes, and what kind of judge will the candidate be in office. Voters know the differences in the political parties. They want to know what party their candidate for coroner identifies with, and they most certainly want to know whether the candidate voted for Donald Trump or Kamala Harris.

Law journal articles overwhelmingly praise the selection of judges by appointment or merit selection, and ridicule selection by election, especially partisan elections.⁶ So why can’t we just be honest with a potential voter? If a voter asks if I am a Democrat or

⁴ Leslie Southwick, *The Least of Evils for Judicial Selection*, 21 MISS. COLL. L. REV. 209, 225 (2002).

⁵ Lenore L. Prather, *Judicial Selection — What Is Right for Mississippi?*, 21 MISS. COLL. L. REV. 199, 204 (2002).

⁶ See, e.g., Nolan M. Jackson, *What the Polls Produce: Why Kentucky Should Retain Nonpartisan Elective Selection of Its Supreme Court Justices*, 105 KY. L.J. 453 (2017); David M. O’Brien, *State Court Elections and Judicial Independence*, 31 J.L. & POL. 417, 422 (2016); Plymouth Nelson, Comment, *Don’t Rock the Boat: Minnesota’s Canon 5 Keeps Incumbents High and Dry While Voters Flounder in A Sea of Ignorance*, 28 WM. MITCHELL L. REV. 1607, 1647 (2002); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 26 (1995).

a Republican, why can't I answer without the risk voiding the election.

Here is my story. This really happened.

On July 4, 2002, I began my campaign for the Court of Appeals, in a "nonpartisan" election. With my newly printed campaign cards in hand, I started to "politic"—that is—I began to ask people for their vote.

My second stop that day was an Independence Day celebration in Flowood, at Winner's Circle Park. Flowood celebrated with several popular country music singers and fireworks. My campaign experts told me there were going to be a lot of people there, and I had to go meet the voters.

People brought their lawn chairs and blankets; they had coolers with food and refreshments. They were ready for an evening of fun, good music, and fireworks. I started my rounds. I was told that I had to go meet every person there, give them my card, and ask for their vote.

So, I did. I walked up to almost every person there. I introduced myself and asked for their vote as I handed them my card. Most of the men, threw my card to the side or ignored it. But, to my surprise, the women actually looked at my card. Some of them told me, "*good luck.*" I think they just felt sorry for me.

After about an hour, and right before the music started, I approached one young family—husband, wife, and two small kids. I interrupted them and said, "Hi, I'm Kenny Griffis, and I'd appreciate your vote for the Court of Appeals." I handed them my card.

The man just tossed it. The lady looked at it closely, and as I was about to move on, she said, "Sir, I have a question for you." My first question. I was excited. I thought she was going to ask me about my law practice, or why I wanted to be a judge, or why I was the most qualified candidate. Nope!

Instead, she said, "We live in the subdivision across the street, and I'd like to bring my kids to this park more often, but I have a hard time getting my kids across the street because the traffic is so bad. Is there any way you could get us a stop light?"

I gave my best answer, "Let me see what I can do."

A little while later, I stopped to take a rest with some friendly faces. The Mayor of Flowood was a friend of mine, and I

told him about my “question.” Quickly and proudly, he said, “We’re putting a stop light there next month; the poles, lights, and all the accessories are at city hall waiting on the contractor.” I said, “Are you sure?”

I made a bee line to that young lady, and she saw me coming. When I got to her, I proudly told her, “Ma’am, you’ve been a burden on my heart. I want you to know that I’m going to get you a stop light there next month.” She stood up, and gave me the biggest hug, and thanked me over and over again. I gave her a couple of my cards and told her I’d appreciate her telling her friends.

I’ve got more stories just like that.

What I have learned is that real voters want to get to know me. They want to know what political party I affiliate with. Just like most voters, the lady had no idea what judges do, what I was running for, or whether I was the best candidate.

I learned that our seemingly noble “nonpartisan” judicial election restrictions serve no actual purpose. Instead, we ask the voters to select their judges with very little to no information. Then, acclaiming that we are “protecting the integrity” of judicial office,” we make it illegal to give voters the very essential information they want and need to select who they want to serve as their judges.

Did these two people vote for me? I have no idea. I do know that I won the Flowood box overwhelmingly. Maybe I won because this dear lady told everyone I got that stop light installed.

Nonpartisan elections are a lie. We ask candidates to hide the truth. This is wrong. I am willing to bet that none of the scholars who write about judicial selection have ever walked up to a potential voter and asked for their vote.

We lawyers often define “justice” as “the search for truth.” Is it? It is not with nonpartisan elections in Mississippi.